92-1511

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM 1992

JACK J. GRYNBERG AND CELESTE C. GRYNBERG,

Petitioners,

v.

UNITED STATES OF AMERICA AND GERALD S. SWANSON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 17, 1993

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QUESTIONS PRESENTED

I. Whether the decision of the Tenth Circuit Court of Appeals, in conflict with decisions of other circuits and this Court binding creditors to results of bankruptcy proceedings, erroneously permits the Internal Revenue Service, years after consummation of Petitioners' confirmed Chapter 11 plan of reorganization, to pursue collection of almost $5,000,000 in pre-bankruptcy gift tax claims, all of which had been scheduled by Petitioners as disputed and contingent, notwithstanding that

(a) by operation of a bankruptcy court order, *all* claims scheduled as disputed or contingent would be disallowed unless asserted in a timely filed proof of claim;

(b) the IRS filed a timely proof of claim only for income taxes, also scheduled by Petitioners as disputed and contingent, and, in violation of the bar order, omitted the gift tax claims;

(c) after notice and an opportunity to be heard, the IRS did not object to confirmation of Petitioners' plan of reorganization which bound all creditors to its terms to the exclusion of all other rights and provided for the discharge of all claims of a creditor upon payment of all amounts allowed under that creditor's timely proof of claim; and

(d) the IRS accepted full payment under the plan of claims allowed under its proof of claim.

QUESTIONS PRESENTED – Continued

II. Whether, as the Tenth Circuit Court of Appeals has ruled, bankruptcy courts do not have jurisdiction over scheduled but unfiled tax claims of the IRS or whether, as decided by this Court and the courts of appeal for the seventh, eighth and ninth circuits, bankruptcy courts have complete jurisdiction over filed and unfiled claims of the IRS.

PARTIES

Petitioners and Respondents named in the caption were all of the parties before the United States Court of Appeals for the Tenth Circuit. Respondent Gerald S. Swanson was served as the District Director for the Internal Revenue Service, a position he no longer holds.

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UNITED STATES OF AMERICA AND GERALD S. SWANSON,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Jack J. Grynberg and Celeste C. Grynberg (the "Grynbergs" or "Petitioners") ask this Court for a writ of certiorari to review the February 17, 1993 decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit for which review is sought is officially

reported at 986 F.2d 367 (10th Cir. 1993). A-32.[1] In that opinion, the Tenth Circuit affirmed a November 4, 1991 order of the United States District Court for the District of Colorado, officially reported at 142 B.R. 415 (D.Colo. 1991). A-19. The District Court order affirmed an order of the United States District Court for the District of Colorado in Bankruptcy which granted summary judgment in favor of Respondents, dismissing an adversary proceeding filed by Petitioners. The Bankruptcy Court order is reported at 91-2 U.S. Tax Cas. (CCH) ¶60,076 (Bkrtcy.D.Colo. 1991). A-1.

JURISDICTION

The Tenth Circuit Court of Appeals filed its opinion on February 17, 1993. 986 F.2d 367 (10th Cir. 1993). Jurisdiction lies under 28 U.S.C. §1254(1) for this Court to review the final decision of the Tenth Circuit Court of Appeals. This petition for certiorari is filed under Rules 13.1 and 13.4 of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes, rules and regulations, which are fully reprinted in the Appendix: 11 U.S.C §§101(5), (10) and (12), 106, 501(c), 505, 507(a)(7), 521, 523(a)(1) and (3),

[1] The Appendix to this petition is cited as "A-___."

1111(a), 1126(f), and 1141(a) and (d)(2); Fed.R.Bank.P. 3003(c)(2), (3) and (4) and 3004.

STATEMENT OF THE CASE

The Grynbergs filed their Chapter 11 petitions in February 1981. A-3. Each scheduled the Internal Revenue Service (the "IRS") as a creditor holding a disputed claim for gift and income taxes. A-2. The disputed gift taxes concerned a number of intrafamily transfers in late 1980 and early 1981. A-2. Each of the transfers and the potential gift tax liability was fully disclosed and itemized in the Grynbergs' bankruptcy schedules. A-2. The Grynbergs did not file a gift tax return upon these transfers because, as also set forth in their bankruptcy schedules, they disputed that any taxable gift had occurred. A-34.

On June 19, 1981, the bankruptcy court issued a "bar order" which the lower courts read as providing that "all claims listed as disputed in the Grynbergs' schedules would be disallowed if a timely proof of claim was not filed with respect to such claims." A-2; A-20; A-39, n.6. The IRS filed a timely proof of claim which listed amounts owing for disputed income taxes but omitted any claim for the disputed gift taxes. A-34.

On April 21, 1982, the bankruptcy court issued its order (the "confirmation order") confirming the Grynbergs' plan of reorganization (the "Plan"). A-2. The Plan specifically mandated that the Grynbergs and all of their creditors were bound by provisions of the Plan "to the

exclusion of all other rights." A-59.[2] The bar order was incorporated by the Plan such that disputed creditors would be limited to amounts allowed on timely filed proofs of claim. A-56, 58. The Plan provided for payment of 100% of all allowed claims and for discharge of the Grynbergs from all pre-petition debts owed to a creditor upon payment of amounts allowed under that creditor's proof of claim. A-57, 59.

Despite notice and opportunity to be heard, the IRS did not object to the Grynbergs' Plan. A-34. The Grynbergs settled litigation over the IRS' proof of claim and, under the settlement, fully paid all allowed claims owed to the IRS. A-3. The Plan was fully consummated. A-3.

In March 1989, long after full payment of its allowed claims and consummation of the Plan, the IRS sent notice to Jack Grynberg of a gift tax deficiency and penalties then totalling nearly $5,000,000. A-34. The assessment was based upon the 1980-81 intrafamily transfers disclosed fully in the Grynbergs' bankruptcy schedules and duplicates the pre-petition gift tax claims which the Grynbergs scheduled as disputed debts. A-3. No deficiency has been asserted against Celeste Grynberg, but the IRS' notice does not exclude future assessments. A-34, n.2.

The Grynbergs disputed that they owed any gift taxes and commenced an adversary proceeding in the bankruptcy court, asking for injunctive and declaratory relief against the assessment. A-3-4. The Grynbergs

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[2] Pertinent provisions of the Plan are at A-54 et seq. The entire Plan was included in the record before the Tenth Circuit.

asserted that the IRS gift tax claim had been disallowed by operation of the bar order and discharged by payment under the confirmation order, both of which bound the IRS and were entitled to *res judicata* effect; that the IRS' failure to include the disputed gift taxes in its proof of claim and accession in the Plan estopped assertion of the disputed deficiency; and that the transfers were not taxable gifts. A-3-4. On cross-motions for summary judgment, the bankruptcy court dismissed the Grynbergs' complaint and abstained from considering the merits of the disputed gift tax claim. A-17. The United States District Court for the District of Colorado affirmed the bankruptcy court judgment. A-19.

On February 17, 1993, the Tenth Circuit affirmed the District Court ruling. The basis for affirmance is the Tenth Circuit's determination that the disputed gift taxes were nondischargeable debts over which the bankruptcy court could have jurisdiction only if included in a filed proof of claim. The Tenth Circuit opined that, because the IRS had omitted the disputed taxes from its proof of claim, those debts escaped the preclusive effect of the bar and confirmation orders. The Tenth Circuit emphasized the jurisdictional underpinnings of its decision by asserting that the Grynbergs could have submitted that claim to bankruptcy jurisdiction only by filing an additional proof of claim on the IRS' behalf.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to review the decision of the Tenth Circuit for two reasons:

I. The Tenth Circuit ruling, by permitting the IRS to avoid jurisdiction over unfiled claims, creates a conflict with decisions of three other circuit courts which subject such claims to adjudication, disallowance, and discharge even if the IRS refuses to file any claim at all.

II. The Tenth Circuit, in conjunction with the Eleventh Circuit, has created a further conflict in the circuits and violated this Court's decisions which bind a creditor who files a proof of claim to the result of the claims adjudication process and to the terms of a confirmed plan of reorganization.

In addition to resolving these conflicts, a writ of certiorari is necessary to safeguard established bankruptcy jurisdiction over tax claims and guarantee that individual Chapter 11 debtors and their creditors are assured that proofs of claim filed by the IRS disclose the total tax obligation which must be resolved. If claims can be hidden in direct violation of bar orders, feasibility of proposed plans cannot be determined and confirmed plans can never resolve all debts or permit a fresh start. If unfiled IRS claims are immune from confirmation orders, the IRS may seize assets of a reorganized debtor to pay those claims and prevent the debtor from making the payments required by the plan. If, as the Tenth Circuit permits, the IRS may file some claims and secrete other claims with impunity, no Chapter 11 debtor or creditor can have confidence in the reorganization process, and

none of the thousands of reorganized debtors can be sure that the process has concluded.

The fundamental impact of the Tenth Circuit decision on claims jurisdiction also creates many related conflicts with rulings of other circuit courts of appeal. By granting Petitioners' writ, this Court can resolve these and all of the direct conflicts created by the Tenth Circuit, and, by making uniform throughout the circuits the effect of bar orders and confirmation orders, afford certainty and finality to individual reorganization cases.

I.

The Tenth Circuit decision conflicts with opinions of three other circuit courts, all approved by this Court, that bankruptcy courts have plenary jurisdiction to determine the amount of all tax debts and discharge those debts, whether or not the IRS files a proof of claim.

Prior to enactment of the Bankruptcy Code, three circuit courts were confronted with the "adamant refusal of the IRS" to file bankruptcy claims in an attempt to avoid the bankruptcy court's determination and discharge of a debtor's tax liability. *Gwilliam v. United States*, 519 F.2d 407, 409 (9th Cir. 1975) ("*Gwilliam*"). In *Gwilliam*, the Ninth Circuit rejected the IRS' position and held that the bankruptcy court has jurisdiction to determine the amount and legality of all taxes of the debtor, "notwithstanding the lack or absence of a prior claim therefor or other proof thereof by IRS." *Id. at 410.* Two other circuits likewise rejected the IRS' attempt to limit bankruptcy court jurisdiction. *McKenzie v. United States*, 536 F.2d 726

(7th Cir. 1976); *Bostwick v. United States*, 521 F.2d 741 (8th Cir. 1975).

Congress expressly codified the *Gwilliam* decision, with respect to all governmental entities, in enacting 11 U.S.C. §106(c). *See, 124 Cong.Rec. (House) September 28, 1978, 32,394; 124 Cong.Rec. (Senate) September 28, 1978, 32,352.* Consistent with *Gwilliam*, Section 505 of the Bankruptcy Code specifically conferred jurisdiction on bankruptcy courts to "determine the amount or legality of any tax." *11 U.S.C. §505(a)(1).*

This Court applied Section 106(c) to States to make it clear that "a State that files no proof of claim would be bound, like other creditors, by *discharge* of debts in bankruptcy, *including unpaid taxes." Hoffman v. Conn. Dept. of Income Maintenance*, 492 U.S. 96, 102 (1989) (emphasis supplied). This Court then applied Section 106, in combination with Section 505, equally to the IRS to "perform a significant function:" to "permit a bankruptcy court to determine the amount and dischargeability of an estate's liability to the Government, *such as unpaid federal taxes . . . whether or not the Government files a proof of claim." United States v. Nordic Village, Inc.*, ___ U.S. ___, 117 L.Ed.2d 181, 189 (1992) (emphasis supplied). In the Grynbergs' reorganization, the amount and discharge of the disputed gift tax claim were established by the Plan, to which the IRS did not object, and finally adjudicated by the confirmation order which the Tenth Circuit erroneously ruled to have been entered without jurisdiction over that claim.

The Tenth Circuit's decision is in direct conflict with *Gwilliam* and the circuit court rulings adopting the holding of *Gwilliam*. The Ninth Circuit imposed bankruptcy jurisdiction over all tax debts "to allow a bankrupt to start over and to enhance the individual's chances of financially rehabilitating himself by eliminating his old tax debts." *Gwilliam v. United States, supra*, 519 F.2d at 409. In stark contrast, the Tenth Circuit concluded that the "fresh start" policy of bankruptcy law had been sacrificed to the IRS' unfiled claim: "it is apparent to us that Congress has made the choice between collection of revenue and rehabilitation of the debtor by making it extremely difficult for a debtor to avoid payment of taxes under the Bankruptcy Code." A-40, quoting *United States v. Gurwitch* (*In re Gurwitch*), 794 F.2d 584, 585-86 (11th Cir. 1986).[3] In contradistinction to the Tenth Circuit's ruling, Congress intended to codify, not reverse, *Gwilliam* and, thus, give priority to the rehabilitative purposes of the Bankruptcy Code.

In the Tenth Circuit, bankruptcy courts have no jurisdiction over unfiled IRS claims. As a result, the IRS can affirmatively subject itself to bankruptcy jurisdiction by

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[3] The *Gurwitch* decision, which was never presented for review by this Court, appears to create the same conflict. There, the plan of reorganization provided for payment of 100% of the IRS' proof of claim. Nonetheless, after confirmation, the IRS was permitted to assess additional taxes on the same claim. The Eleventh Circuit rejected the debtor's argument that "the bankruptcy proceedings were a final determination of his tax liabilities," as fixed by his plan. *Id. at 585*. The opinion, however, does not discuss the effect, if any, of a bar order or disclose whether the terms of Mr. Gurwitch's plan foreclosed all other rights of creditors.

filing a proof of claim but limit that jurisdiction to those debts included in its proof. That precedent insulates the IRS from bar orders disallowing omitted tax claims and confirmation orders discharging those claims. The Tenth Circuit decision, thus, creates a conflict with rulings of the Seventh, Eighth and Ninth Circuits and is at odds with this Court's opinions in *Hoffman* and *Nordic Village.*

II.

The Tenth Circuit opinion violates established principles enunciated by this Court and creates a conflict among the Circuits by refusing to bind the IRS to the consequences of filing its proof of claim and participating in claims proceedings and plan confirmation.

This Court has repeatedly emphasized that, by filing a claim in a bankruptcy case, a creditor is subjected to and bound by the claims adjudication process, and to discharge of its debts. *Katchen v. Landy,* 382 U.S. 323, 399 (1966); *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 60, n. 14 (1989); *Langenkamp v. Culp,* 498 U.S. 42 (1990). *And see, In re Kolstad,* 928 F.2d 171, 174 (5th Cir. 1991), *cert. den.,* ___ U.S. ___, 116 L.Ed.2d 439 (1991). Equally clear precedent establishes that plan confirmation bars relitigation of any claims which were or could have been asserted and binds all creditors to the plan, even to terms which may be unconstitutional, illegal, unfair, or violative of the Bankruptcy Code. *See, e.g., Stoll v. Gottlieb,* 305 U.S. 165, 170-1 (1938); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 376-7 (1940); *Underwriters Nat'l Ins. Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n.,*

455 U.S. 691 (1982).[4] The Tenth Circuit specifically refused to apply this precedent when it rejected the jurisdictional predicate to this Court's holding in *Nordic Village*.

The holding of the Tenth Circuit that unfiled claims of the IRS are unaffected by orders entered in bankruptcy cases clearly violates the fundamental principles of finality enunciated by this Court. The Tenth Circuit articulated no principle of law or equity to exempt the IRS from the salutary principle of *res judicata*. *See, Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). Each of the bases for the Tenth Circuit's opinion fails when analyzed in light of the plenary jurisdiction granted to district courts in bankruptcy cases.[5]

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[4] The *res judicata* bar of a confirmation order prevents all creditors from subsequently litigating "all grounds for . . . recovery that were previously available," *Brown v. Felsen*, 442 U.S. 127, 131 (1979). In the same manner, Bankruptcy Code Section 1126(f) mandates that, upon confirmation, the IRS was conclusively presumed to have accepted the Grynbergs' treatment of its tax claims under the Plan. *11 U.S.C. §1126(f)*.

[5] The method suggested by the Tenth Circuit to obtain jurisdiction over the IRS, even if necessary, was not available to Petitioners. The Tenth Circuit suggested that the Grynbergs could have provided jurisdiction over the gift tax debt by filing a proof of claim for the IRS under 11 U.S.C. §501(c) and Fed.R.Bankr.P. Rule 3004. A-41. Section 501(c) and Rule 3004 permit a debtor to file a proof of claim *only* if a creditor does not timely file a proof of claim. Because the IRS filed a timely proof of claim, the Grynbergs could not have filed any claim for the gift taxes. In any event, by scheduling the gift tax claim as disputed and contingent, the Grynbergs already placed that claim before the bankruptcy court.

III.

The Tenth Circuit's holding that district courts do not have jurisdiction over unfiled claims of the IRS has created related conflicts with rulings of several other circuit courts of appeal.

A further need for the writ requested by Petitioners is demonstrated by the related conflicts created by the Tenth Circuit ruling. In deviating from the fundamental principle that a bankruptcy court has jurisdiction over all claims, whether filed or unfiled, the Tenth Circuit necessarily conflicts with rulings of other circuit courts. For example, several circuits have held that, upon confirmation, creditors lose pre-petition claims and retain only those rights provided by the plan, even if the plan gives a security interest to an unsecured creditor[6], violates express provisions of the Bankruptcy Code[7], or is otherwise improper. *Sure-Snap Corp. v. State Street Bank and Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991).

The Tenth Circuit opinion did not address the bankruptcy claims process or discuss any of the contrary circuit court opinions. Rather, the circuit court determined that, under 11 U.S.C. §1141(d)(2), purportedly nondischargeable debts are immune from that law. A-35.[8]

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[6] *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 463 (6th Cir. 1991).

[7] *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987).

[8] In focusing on discharge, the Tenth Circuit disregards bankruptcy jurisdiction to determine the *amount* of the Grynbergs' tax debts through the claims process. *United States v. Nordic Village, Inc., supra*, 117 L.Ed.2d at 189. The Grynbergs triggered that process by listing gift and income taxes as dis-

Nothing in the Bankruptcy Code or its legislative history supports a conclusion that enactment of section 1141(d)(2) was intended to alter the precedent established by this Court in *Stoll v. Gottlieb, supra, Chicot County Drainage Dist. v. Baxter State Bank, supra,* and their progeny. Research discloses no decision which analyzes the interplay between Section 1141(d)(2) and the well-established precedent of this Court concerning the binding effect of confirmed plans of reorganization.[9] The decisions of the Second, Sixth and Seventh Circuits cited above enforce that precedent but do not discuss Section 1141(d)(2); the Tenth and Eleventh Circuits ignore this

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puted claims. *11 U.S.C. §521.* The IRS' proof of claim superseded the Grynbergs' schedules and comprised the IRS' entire claim. *Fed.R.Bankr.P. Rule 3003(c)(4).* When the IRS filed a proof of claim omitting the gift tax claim, it caused that claim to have no value, regardless of its dischargeability. Sections 1141(d)(2) and 523(a)(1), on which the Tenth Circuit relies, exempt only specified "debts" from discharge. A "debt" is a "liability on a claim." *11 U.S.C. §101(10).* "Claim" and "debt" are coextensive; one cannot exist without the other. *See, e.g., Ohio v. Kovacs,* 469 U.S. 274, 279 (1985); *Kelly v. Robinson,* 479 U.S. 36, 59 (1986) (Marshall, J., dissenting). A "claim" is a "right to payment" [11 U.S.C. §101(5)(A)], "nothing more nor less than an *enforceable obligation.*" *Pennsylvania Dept. of Public Welfare v. Davenport,* 495 U.S. 552, 559 (1990) (emphasis supplied). Upon disallowance of the gift tax claim by operation of the bar order, the related debt disappeared, and the IRS had no enforceable gift tax obligation, even if nondischargeable.

[9] This Court has held that plans of reorganization may provide for payment of nondischargeable tax debts contrary to the wishes of the IRS. *United States v. Energy Resources Co., Inc.,* 495 U.S. 545 (1990).

Court's decisions. By reviewing the Tenth Circuit's opinion, this Court may address and clarify these inconsistencies.

Similarly, the Tenth Circuit's ruling that the IRS' failure to comply with the bar order did not result in disallowance of the gift tax claim conflicts with decisions of two other circuits which hold that the penalty for that violation is claim disallowance. A-39. *See, In re Johnson,* 901 F.2d 513, 522 (6th Cir. 1990) [" . . . the bankruptcy and district courts did not err in disallowing the untimely claim by the IRS."]; *In re Montoya,* 965 F.2d 554, 555 (7th Cir. 1992) [upon disallowance for failure to file response to claims objection, the court noted: "There is no doubt that in the face of a [bankruptcy] court order disallowing the tax assessments, the IRS was prohibited from continuing to assert its claims."]. As this Court has noted, bankruptcy deadlines "may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor v. Freeland & Kronz,* ___ U.S. ___, 118 L.Ed.2d 280, 287 (1992).[10]

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[10] The IRS' own regulations require compliance with bar orders. Treas. Reg. §301.6871(a)-1(a) commands the IRS, upon the filing of a bankruptcy petition, to "*immediately* assess any deficiency of . . . gift tax . . . " (emphasis supplied). Upon such assessment, Reg. §301.6871(a)-2(b) mandates that "District directors should, *within the time limited . . . by the appropriate orders of the court* in which such proceeding is pending, file proof of claim covering [the debtor's tax liability]" (emphasis supplied).

IV.

The Tenth Circuit decision establishes precedent which may vitiate the ability of individual debtors to propose or effectuate feasible plans of reorganization and casts doubt on the finality of confirmed plans, to the detriment of debtors and creditors alike.

This Court has emphasized that the overriding goal of bankruptcy courts in Chapter 11 proceedings is ensuring the success of the reorganization. *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 527-28 (1984). The Tenth Circuit decision establishes precedent, contrary to this goal, which will render an individual debtor incapable of proposing or effectuating a feasible plan of reorganization.

In fiscal 1992, more than 3200 individual Chapter 11 proceedings were filed,[11] and thousands more were initiated and completed in prior years. None of these reorganizations can succeed and be finally resolved without full disclosure of all liabilities of the debtor, particularly tax debts. In order to propose a plan, a debtor must know the full extent of his tax and other debts. For a court and creditors to determine whether the proposed plan is feasible, all priority debts must be considered. Bar orders, which enforce a "clear Congressional intent to require filing of valid proofs of claim within the time limits it has set," are pivotal to such disclosure. *Hoos & Co. v. Dynamics Corp. of America,* 570 F.2d 433, 439 (2d Cir. 1978).

If the IRS can conceal and immunize tax claims from confirmation orders, plan confirmation and effectuation

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[11] The Administrative Office of the United States Courts, Statistical Tables for the Twelve Month Period Ended September 30, 1992, Table F-2, p. 96.

is impossible. The debtor and his creditors cannot determine whether available assets and income will be sufficient to pay all claims. Assets and funds earmarked for payment of creditors can be seized to pay hidden tax debts. Post-confirmation lenders and suppliers cannot extend credit in reliance on the fresh start guaranteed by the confirmed plan. If the IRS is permitted to ambush a reorganized debtor in this fashion, reorganizations will fail with an attendant waste of time, expense, and judicial resources.

RELIEF REQUESTED AND CONCLUSION

Petitioners urge this Court to grant certiorari to resolve the existing conflict of authority among the circuit courts and to correct the Tenth Circuit's error in applying decisions of this Court, so as to safeguard the jurisdiction of the bankruptcy courts provided in the Bankruptcy Code. Alternatively, Petitioners request that this Court grant their petition for certiorari and summarily reverse the decision of the Tenth Circuit.

Respectfully submitted this 17th day of May, 1993.

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

IN BANKRUPTCY

In re JACK J. GRYNBERG and CELESTE C. GRYNBERG, Debtor(s).	Adversary No. 89 C 1371 Bankruptcy No. 81 B 00821 C
JACK J. GRYNBERG and CELESTE C. GRYNBERG, Plaintiff(s), v. UNITED STATES OF AMERICA and GERALD S. SWANSON, Defendant(s).	

ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT

This matter comes before the Court on cross-motions for summary judgment in this adversary proceeding filed by the Chapter 11 debtors, Jack and Celeste Gryn berg (the Grynbergs), against the United States of America and Gerald S. Swanson as District Director of the Internal Revenue Service, an agency of the United States (hereinafter Defendants).

INTRODUCTION

There are many facts reflected in the pleadings, briefs, and the Grynbergs' supporting affidavit in this proceeding which are clearly undisputed. Only a few of these facts are relevant to determination of the matters at issue. These facts include:

1. The Grynbergs each filed a petition for relief under Chapter 11 of the Bankruptcy Code on February 20, 1981 (the Reorganization Cases).

2. The Reorganization Cases were jointly administered, and a joint plan of reorganization (the Reorganization Plan) was approved pursuant to the Court's Order of confirmation on April 21, 1982 (the Confirmation Order).

3. Both Jack and Celeste Grynberg listed a possible, contingent liability for gift taxes for 1980 and prior years in their respective bankruptcy schedules, noting that the tax liability, for an unknown amount, was disputed.

4. In their respective statements of financial affairs, the Grynbergs both itemized an extensive number of intra-family transfers of certain mineral properties (the Transfers), as gifts made by the Grynbergs within the year preceding their Chapter 11 petitions.

5. Defendants never filed a proof of claim for any gift taxes attributable to the Transfers, notwithstanding the entry of the Court's June 19, 1981 Order (the Bar Order), stating that all' claims listed as disputed in the Grynbergs' schedules would be disallowed if a timely proof of claim was not filed with respect to such claims.

6. Defendants did file a proof of claim for certain income tax obligations, also listed in the Grynbergs'

schedules as disputed claims. Resolution of these claims was ultimately effected through settlement of pre- and postpetition tax court litigation. The claims were paid pursuant to the Reorganization Plan.

7. The only federal tax liability reflected in the Reorganization Plan was the above-ref erenced [sic] claim for income taxes. Neither the Reorganization Plan nor the accompanying disclosure statement approved by the Court contain any mention whatsoever of the disputed gift tax. Defendants did not object to either the disclosure statement or Reorganization Plan.

8. The Grynbergs acknowledge that they never filed a federal gift tax return concerning the Transfers. They did not file a return because they dispute the fact that any tax is due.

9. The Reorganization Plan is fully consummated.

10. In March 1989 Defendants notified Jack Grynberg for the first time that a gift tax deficiency had been determined based on the Transfers he made in 1980 and 1981. Defendants have not asserted any deficiency against Celeste Grynberg to date, but the memorandum included with Defendants' notice to Jack Grynberg does not rule out the possibility of such determination in the future.

11. The Grynbergs assert four claims for relief in this proceeding (the Complaint), seeking to legally and equitably preclude Defendants from assessing and collecting any pre-petition gift taxes based on the Transfers. The Grynbergs' Complaint necessarily assumes the existence of gift tax liability for purposes of the claims

alleged, even though there has not been any determination of liability and the Grynbergs dispute the defendant's claims.

SUMMARY JUDGMENT

The standard for the granting of summary judgment has been stated by the Tenth Circuit Court of Appeals as follows:

> Summary judgment is appropriate when the materials submitted to the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." What facts are material depends on the substantive law being applied. Although we view the evidence in the light most favorable to the party opposing summary judgment, disputes about immaterial facts will not preclude summary judgment. Should a non-moving party make some showing on a material issue, we must consider the standard of proof in the case . . . and decide whether the showing is sufficient for a reasonable trier of fact to find for the non-moving party on that issue. A scintilla of evidence in favor of the non-moving party is not enough to preclude summary judgment. Moreover, should a non-moving party not make a sufficient showing on any essential element of his case, all other facts are rendered immaterial, and summary judgment is appropriate.

Kaiser-Francis Oil Co. v. Producer's Gas Co., 870 F.2d 563, 565 (10th Cir. 1989). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91

L.Ed.2d 202 (1986); *Windon Third Oil & Gas v. Federal Deposit Insurance Corp.*, 805 F.2d 342 (10th Cir. 1986).

ISSUES

The parties' pleadings raise numerous interrelated issues concerning the jurisdiction and authority of this Court to grant the injunctive relief requested and the appropriateness of declaratory relief on the grounds asserted by the Grynbergs. The threshold determination in this proceeding, however, is whether the pre-petition tax liability at issue is a debt excepted from discharge pursuant to 11 U.S.C. §§ 1141 and 523.

DISCUSSION

Defendants' motion pursuant to Bankruptcy Rule 7012 is properly treated as a motion for summary judgment. *See Lawrence Nat'l Bank v. Edmonds*, 924 F.2d 176 (10th Cir. 1991); *Smith v. Yellow Freight System, Inc.*, 536 F.2d 1320, 1320-21 (10th Cir. 1976); *Kaufman v. Moss*, 420 F.2d 1270 (3rd Cir. 1970), *cert. denied*, 400 U.S. 846, 91 S. Ct. 93, 27 L.Ed.2d 84 (1970). Accordingly, the Court must evaluate each party's motion separately under the standards of Rule 56. *See Towne Management Corp. v. Hartford Accident and Indemnity Co.*, 627 F. Supp. 170 (D. Md. 1985).

Merely because the affidavit submitted in support of the Grynbergs' motion is uncontroverted does not mandate judgment in their favor if the facts alleged therein do not negate the existence of all issues of material fact and establish a right to relief as a matter of law. *See Fitzke v. Shappell*, 468 F.2d 1072 (6th Cir. 1972). Furthermore, the

Court cannot rely solely on Defendants' failure to specifically respond to the Grynbergs' motion as the basis for entering judgment without first examining all materials before the Court under the appropriate summary judgment standards. *See Smith v. Hudson*, 600 F.2d 600 (6th Cir. 1979), *cert. denied*, 444 U.S. 986, 100 S. Ct. 495, 62 L.Ed.2d 415 (1979). *Accord Rohlfing v. Cat's Paw Rubber Co.*, 17 F.R.D. 426 (N.D. Ill. 1954).

1. Non-Dischargeable Tax Debts

The Grynbergs' actual liability for the tax at issue need not be conclusively determined for this Court to find that, to the extent such liability is ultimately established as a pre-petition obligation, it is a debt excepted from discharge. The debt can remain legally enforceable, even if it is disallowed as a claim against the Grynbergs' bankruptcy estates. See *In re Crist*, 85 Bankr. 807, 816 (Bankr. N.D. Iowa 1988).

The Bankruptcy Code is explicit in this regard. Confirmation of a reorganization plan does not release a debtor from tax liabilities made non-dischargeable under Section 523. 11 U.S.C. § 1141(d) (2). In this adversary case, that feature of the dispute is crucial.

Section 523(a)(1) defines those taxes which are excepted from discharge to include any debt for a tax-

> (A) of a kind and for the periods specified in section 507(a) (2) or 507(a) (7) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required-
>
> (i) was not filed . . .

The subsections within Section 523(a)(1) are, by the terms of the statute, disjunctive in nature. *See In re Etheridge*, 91 Bankr. 842, 844-45 (Bankr. C.D. Ill 1988); *In re Edwards*, 74 Bankr. 661, 663-65 (Bankr. N.D. Ohio 1987).

Evaluation of the facts in this proceeding indicates that the gift taxes at issue fall squarely within the scope of Section 523(a)(1)(B) as alleged by Defendants, and perhaps within the scope of Section 523(a)(1)(A).

Section 523(a)(1)(B). The Grynbergs readily concede that they never filed a gift tax return. Accordingly, this undisputed fact is properly before the Court. *See United States v. One Heckler-Koch Rifle*, 629 F.2d 1250 (7th Cir. 1980).

Defendants' actual or constructive knowledge of the Transfers and of the Grynbergs' potential gift tax liability does not excuse compliance with the requirement that an appropriate gift tax return, signed by the Grynbergs, be filed with respect' to the Transfers if they are taxable gifts. 26 U.S.C. §§ 6019; 6075(b). Notice of facts allegedly "akin" to those in a proper return is irrelevant. *See* 26 U.S.C. §§ 6020(b)(2); 6501(b)(3). *See generally, In re Hofman*, 76 Bankr. 853 (Bankr. S.D. Fla. 1987); *In re Haywood*, 62 Bankr. 482 (Bankr. N.D. Ill. 1986). *Cf. In re Crist, supra.*

The Grynbergs' failure to file the requisite tax return for any gift tax attributable to the Transfers establishes, or fixes, the non-dischargeable character of such tax as a matter of law under Section 523(a)(1)(B), if such liability exists. The Grynbergs' contention that listing the potential gift tax claims as disputed debts within their bankruptcy schedules was akin to filing a proper gift tax

return with the I.R.S. reflecting no liability owed, is without merit.

Section 523(a)(1)(A). The gift tax also appears excepted from discharge pursuant to Section 523(a)(1)(A), as it is precisely the kind of tax described in Section 507(a)(7)(E). A gift tax is an excise type tax and is based upon transactions (the Transfers) which occurred prior to the filing of the Grynbergs' reorganization cases. The Grynbergs' gift tax returns concerning the Transfers, assuming they were taxable gifts, should have been filed within three years of the petition date or thereafter. *See* 26 U.S.C. §§ 6019; 6075. The fact that a claim for the tax was not filed by the I.R.S. nor allowed in the Grynbergs' reorganization cases is not decisive and may simply be irrelevant. The I.R.S.'s failure to seek payment under the plan does not transform an otherwise non-dischargeable obligation into a dischargeable debt.

2. Res Judicata

The Grynbergs are mistaken in their contention that both the Bar Order and the Confirmation Order legally preclude Defendants' assertion of a gift tax deficiency because of the doctrine of res judicata. The first and second claims for relief asserted by the Grynbergs fail as a matter of law.

The res judicata argument is fatally flawed in two respects. First, Defendants' notice of a gift tax deficiency does not constitute a claim for distribution from the Grynbergs' bankruptcy estates merely because the reorganization cases are still open. Upon confirmation of the Reorganization Plan, all the Grynbergs' pre-petition

property was revested in the Grynbergs, subject only to the express provisions of the Reorganization Plan. See *11 U.S.C. §§ 1141(b), (c)*. There is no res judicata bar or other prohibition under the terms of the Bar Order, the Confirmation Order, or any provision of the Bankruptcy Code which negates Defendants' right to collect a non-dischargeable tax debt from the Grynbergs personally in the postconfirmation period. See *In re Gurwitch*, 794 F.2d 584 (11th Cir. 1986), *aff'd* 54 Bankr. 927 (S.D. Fla. 1985). Secondly, disallowance of a claim for disputed taxes under either the Bar Order or the final provisions of the Reorganization Plan and Confirmation Order, based solely on Defendants' failure to file a timely proof of claim, does not effect a discharge of the underlying debt. *See In re Galbreath*, 83 Bankr. 549, 550-51 (Bankr. S.D. Ill. 1988).

Settlement of the parties' tax court litigation concerning income taxes for 1974-79 without inclusion of the Grynbergs' potential gift tax liability also fails to establish a basis for res judicata. Application of res judicata requires satisfaction of three fundamental criteria, including an identity of claims or subject matter. *See In re Werth*, 37 Bankr. 979 (Bankr. D. Colo. 1984), *aff'd*, 54 Bankr. 619 (D. Colo 1985). The parties' prior litigation concerning income taxes clearly differs from a claim involving gift taxes based upon an unrelated series of transactions which occurred in different tax years. A gift tax claim could not have even been brought in the context of the parties' prior lawsuits. *See Pyro v. Commissioner*, 83 T.C. 626, 632 (1984).

3. Equitable Estoppel/Waiver

The Grynbergs' purportedly exclusive reliance on Defendants' failure to timely file a proof of claim, to object to the terms of the Reorganization Plan, or to assert any gift tax deficiency prior to March 1989 does not give rise to a claim for equitable estoppel or waiver. The Grynbergs' third and fourth claims for relief are accordingly subject to dismissal as a matter of law.

The Grynbergs' selective reliance on Defendants' failure to act is neither reasonable nor justified, both of which are critical factors in a claim for equitable estoppel. There is simply no excuse for the Grynbergs' total disregard of the express statutory provisions of either the Bankruptcy Code or the Internal Revenue Code. Any expectation that these laws would somehow not apply if the Grynbergs simply did not consider or rely on them in making allegedly critical decisions in their reorganization cases is inherently unreasonable and lacking in legal justification.

The language in the Third Circuit's decision in *In re Becker's Motor Transportation, Inc.*, 632 F.2d 242 (3rd Cir. 1980) *cert. denied*, 450 U.S. 916, 101 S. Ct. 1358, 67 L.Ed.2d 341 (1981) is cited by the Grynbergs as favorably dispositive of their equitable estoppel claim. The *Becker* decision on equitable estoppel is not applicable here as the facts in *Becker* are readily distinguishable from those present in this proceeding. The non-dischargeable tax debt at issue in *Becker* was part and parcel of the same claim for which a timely proof of claim had been filed, allowed, and paid pursuant to a settlement provided for under the debtor's

reorganization plan. The defendant in that case had affirmatively represented, by virtue of their proof of claim and settlement of the parties' dispute concerning that claim, that the amount agreed upon by the parties in the context of the debtor's reorganization plan constituted the debtor's entire pre-petition obligation for the specific tax at issue.

The situation in the case at bar is much different. The Grynbergs readily acknowledge, and in fact persuasively argue, that Defendants' prior proof of claim for income taxes are completely *separate and distinct from the gift tax deficiency* at issue. *See* Grynbergs' Brief, pp. 24-26. It is undisputed that the issue of gift taxes was never even raised in the context of the parties settlement of litigation concerning the Grynbergs' pre-petition income tax obligations.

The Grynbergs' waiver arguments are also unpersuasive. The Grynbergs allege no facts whatsoever which indicate that Defendants knowing [sic] relinquished the legal right to pursue a gift tax deficiency against the Grynbergs. Defendants' failure to file a proof of claim and affirmatively seek distribution from the Grynbergs' bankruptcy estates, even if volitional, does not constitute a waiver of their right to assess and collect a non-dischargeable tax debt after plan confirmation. *11 U.S.C. §§ 1141(d)(2); 523(a)(1). See Newberg v. United States,* 296 F.2d 152 (2d Cir. 1961), *aff'd* 187 F. Supp. 158 (S.D.N.Y. 1960); *In re Galbreath, supra. See also Palmer v. First Nat. Bank of Kingman,* 692 P.2d 386, 391 (Kan. App. 1984).

Defendants' postconfirmation failure to assert the deficiency at issue until March 1989 also does not constitute a waiver of Defendants' legal rights. The pertinent tax laws expressly allow Defendants to act at any time with an unlimited statute of limitations in effect. *See* 26 U.S.C. § 6501(c)(3). *See* generally *In re Hoffman, supra; In re Haywood, supra.* The Grynbergs' actual or even detrimental reliance on Defendants' delay in asserting the deficiency does not establish the existence of waiver or laches under the circumstances, especially since an unlimited statute of limitations exists and there is no evidence that there were affirmative representations made by Defendants that a def iciency [sic] would not be assessed. *See Lucia v. United States,* 474 F.2d 565, 569-70 (5th Cir. 1973); *New York Athletic Supply Co., Inc. v. United States,* 450 F. Supp. 469, 470-73 (S.D.N.Y. 1978). *See also Norman R. Davies v. Comm'r.,* 42 TCM 768, T. C. Memo. 1981-438; *Badaracco v. Comm'r.,* 464 U.S. 386, 398, 104 S. Ct. 756, 764, 78 L.Ed.2d 549 (1984).

There is simply no basis to sustain the Grynbergs' claims for equitable relief. Although one of the main purposes of the bankruptcy laws is to provide a debtor with a fresh start, that policy does not mandate relief from personal liability for unpaid taxes which fall within the scope of Section 523. *See Bruning v. United States,* 376 U.S. 358, 84 S. Ct. 906, 11 L.Ed.2d 772 (1964); *In re Gurwitch, supra.* Further, there are no equitable considerations present here, or sufficiently alleged and correctly pleaded, which compel such a determination. If, as the Grynbergs allege, their paramount concern and expectation was that all their pre-petition obligations would be conclusively and finally resolved in the context of their

reorganization cases, they at all times had the ability to insure that result regardless of whether the Defendants filed a proof of claim. *See 11 U.S.C. § 501(c); 11 U.S.C. § 505; Bankruptcy Rule 3004; Bankruptcy Rule 4007; Bankruptcy Rule 7001(6). See also In re Galbreath, supra; In re Eckols,* 77 Bankr. 345 (Bankr. N.H. 1987). See generally *8 Collier on Bankruptcy,* 3004.01 (15th ed. 1990). The Grynbergs' assertion that they were denied the finality they should be entitled to under Chapter 11 or that they have been otherwise prejudiced as a result of Defendants' allegedly inequitable or dilatory conduct is factually and legally unsubstantiated.

JURISDICTION

The Court clearly has jurisdiction, generally, to determine the dischargeability of the gift taxes at issue as a core matter arising under Title 11. 28 U.S.C. §§ 1334(b); 157(b); 1141(d)(2); 523(a)(1). *See also Eberly v. United States,* 406 F. Supp. 1361 (M.D. Fla. 1976). Under the circumstances in this proceeding, however, the Court does not have the jurisdiction to enjoin Defendants' actions on a permanent basis, nor the authority to do so as a preliminary measure pending final determination of the Grynbergs' gift tax obligations. The requisite criteria for such relief have not been satisfied.

Of the four claims asserted by the Grynbergs none establishes a right to declaratory relief in their favor and each claim is subject to dismissal as a matter of law. Further, the Grynbergs have not established non-liability for the gift taxes at issue as a matter of law and merely continue to "dispute" the tax. In the absence of any

established certainty that Defendants cannot succeed in their assertion of a gift tax deficiency against the Grynbergs under any circumstances, and given the fact that the Grynbergs have legal alternatives available to challenge the tax at issue, this Court is restrained by the Tax Anti-Injunction Act from granting permanent injunctive relief against Defendants. *See* 26 U.S.C. § 7421(a); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 8, 82 S. Ct. 1125, 1129, 8 L. Ed. 2d 292 (1962). See also *South Carolina v. Regan*, 465 U.S. 367, 378; 104 S. Ct. 1107, 1114; 79 L. Ed. 2d 372 (1984); *Bob Jones University v. Simon*, 416 U.S. 725, 738-42; 94 S. Ct. 2038, 2046-48; 40 L.Ed.2d 496 (1974).

Although authority exists for the proposition, there is no basis for exercise of the Court's power under 11 U.S.C. § 105 to grant even preliminary injunctive relief in this proceeding. *See In re John Renton Young, Ltd.*, 87 Bankr. 635 (Bankr. D. Nev. 1988). *See also In re American Bicycle Ass'n*, 895 F.2d 1277 (9th Cir. 1990). The limited exception to the Anti-Injunction Act sometimes applied in the bankruptcy context is inapplicable here. No threat exists to the Grynbergs' ability to formulate and consummate a reorganization plan, and there is also no showing of likelihood of success on the merits of their gift tax dispute. *See generally, Bostwick v. United States*, 521 F.2d 741 (8th Cir. 1975); *In re Jon*, 30 Bankr. 831 (D. Colo. 1983); *In re Campbell Enterprises Inc.*, 66 Bankr. 200 (Bankr. N.J. 1986); *In re Datair Systems Corp.*, 37 Bankr. 690 (Bankr. N.D. Ill. 1983); *In re Original Wildwest Foods, Inc.*, 45 Bankr. 202 (Bankr. W.D. Texas 1984).

The fact that the Grynbergs may have to pay the taxes at issue if they opt to pursue refund litigation as opposed to their pre-payment legal remedies in Tax Court

does not constitute irreparable injury which mandates injunctive relief. Payment of the tax is just one of their legal options. Another is to withhold payment if they feel their position is sufficiently meritorious to sustain an ultimately favorable determination. Even though the record before this Court does not establish a clear likelihood of success for the Grynbergs, that possibility cannot be ruled out in a proceeding where the issue of liability is fully litigated.

ABSTENTION

Section 505 of the Bankruptcy Code provides this Court with the authority to adjudicate the Grynbergs' pre-petition gift tax liability as a core proceeding. *See* 28 U.S.C. § 1334(b). However, the Court is not compelled to exercise its jurisdiction where discretionary abstention is appropriate. *See 28 U.S.C. § 1334(c)(1). See generally 2 Collier on Bankruptcy, 305.01 (15th ed. 1990). Cf. In re Pan American School of Travel Inc.*, 47 Bankr. 242 (Bankr. S.D.N.Y. 1985); In re Major Dynamics, Inc., 14 Bankr. 969 (Bankr. S.D. Calif. 1981).

The Grynbergs have available alternative forums for determination of their gift tax liability before authorities possessing the specialized expertise to address the federal tax law issues in dispute. Furthermore, and perhaps most significantly, the rationale which supports bankruptcy jurisdiction of substantive tax matters under Section 505, (i. e., the need for expeditious resolution of liability issues in order to foster the ability to formulate a reorganization plan in a timely manner and to effectively rehabilitate financial affairs), is simply inapplicable in

this case. The Grynbergs' Reorganization Plan was confirmed more than eight years ago and is fully consummated. While the reorganization cases are technically still open, there is no active reorganization in process which mandates this Court's intervention to insure the Grynbergs' ability to successfully reorganize their affairs.

The Court finds that abstention in this matter would best serve the interests of justice and of all concerned. Litigation of the parties' substantive dispute here would only be duplicative of proceedings already in progress. It would also be premature prior to the Grynbergs' exhaustion of their administrative remedies. The Grynbergs will still have their day in court and will have the benefit of administrative and judicial expertise unavailable in this forum. The limited resources of this Court will be conserved for those matters which warrant its immediate attention and are amenable to resolution exclusively within this Court's bankruptcy jurisdiction.

MISCELLANEOUS MATTERS

There are three additional motions currently pending in this proceeding, the Grynbergs' Motion for Entry of Default Judgment, their Motion for Preliminary Injunction filed April 12, 1991, and Defendants' Motion for Stay of Discovery pending determination of the parties' cross-motions for summary judgment. Under the circumstances, the Grynbergs' motion for Entry of Default Judgment cannot be granted. See Fed. R. Civ. P. 55(3).

As a result of this Court's discussion and above determination, their Motion for Preliminary Injunction

must also be denied. The Court need not address Defendants' motion, as discovery issues in this proceeding are now moot.

CONCLUSIONS

None of the four claims asserted in the Grynbergs' Complaint state a claim upon which the Court can grant the relief requested. The gift taxes at issue are non-dischargeable pre-petition debts to the extent the Grynbergs' liability is finally and conclusively established in the course of appropriate administrative and legal proceedings. Absent a determination that the Transfers are not taxable gifts, there are no grounds asserted in the Complaint which preclude Defendants from pursuing assessment and collection of a non-dischargeable pre-petition tax debt from the Grynbergs subsequent to consummation of their Chapter 11 reorganization.

ORDER

In accordance with the foregoing, it is hereby ORDERED that:

1. the Grynbergs' Motion for Summary Judgment is denied;

2. Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment, is granted;

3. each of the four claims for relief asserted in the Grynbergs' Complaint is dismissed with prejudice;

4. the Grynbergs' Motion for Entry of Default Judgment is denied;

5. each party shall bear its own costs in this matter.

Dated: May 28, 1991

BY THE COURT:

/s/ _____
Patricia Ann Clark
Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-F-1025
Bankruptcy Case Nos. 81-B-00821-C and 81-B-00825-C
Adversary No. 89-C-1371

IN RE:

JACK J. GRYNBERG and CELESTE C. GRYNBERG,

Debtors.

JACK J. GRYNBERG and CELESTE C. GRYNBERG,

Appellants,

v.

UNITED STATES OF AMERICA, and
GERALD S. SWANSON,

Appellees.

ORDER

Sherman G. Finesilver, Chief Judge

This matter comes before the Court on appeal from the United States Bankruptcy Court, filed June 17, 1991. Appellants appeal the bankruptcy court's Order on Cross Motions for Summary Judgment. Jurisdiction is based on 28 U.S.C.A. § 158 (West Supp. 1991). For the reasons set forth below, the order of the bankruptcy court is AFFIRMED.

I.

BACKGROUND

The facts on appeal are largely undisputed.[1] On February 20, 1981, the Grynbergs each filed a petition for relief under Chapter 11 of the Bankruptcy Code ("the Reorganization Cases"). The Reorganization Cases were jointly administered. On April 21, 1983, the bankruptcy court approved a joint reorganization plan ("Reorganization Plan") pursuant to its Order of Confirmation ("Confirmation Order").

On their bankruptcy schedules, both Jack and Celeste Grynberg listed a disputed tax liability for gift taxes as a pre-petition contingent liability. During the year preceding the bankruptcy filings, the Grynbergs made a number of intra-family transfers of mineral properties. The Grynbergs itemized these transfers in filings with the bankruptcy court. However, the Grynbergs never filed a federal gift tax return concerning the transfers.

On June 19, 1981, the bankruptcy court issued a "Bar Order." The Bar Order stated that "all claims listed as disputed in the Grynbergs' schedules would be disallowed if a timely proof of claim was not filed with respect to such claims." The Internal Revenue Service ("IRS") never filed a proof of claim for any gift taxes attributable to the mineral property transfers.[2] The IRS, however, did

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[1] All factual recitations in this Order appear in the record.

[2] In this appeal, Appellees are the United States of America and Gerald Swanson, previously the District Director for the Internal Revenue Service. The IRS is the federal agency that took all actions for which Appellees are being sued.

file a proof of claim for certain income tax obligations that the Grynbergs listed as disputed claims.

Consequently, the only federal tax liability reflected in the Reorganization Plan was the claim for income taxes. Neither the Reorganization Plan nor the accompanying disclosure statement made any reference to the disputed gift tax. The IRS did not object to the disclosure statement or the Reorganization Plan. The Reorganization Plan has been fully consummated.

In March 1989, the IRS notified Jack Grynberg that a gift tax deficiency had been determined based on the transfers made in 1980 and 1981. No deficiency has been asserted against Celeste Grynberg to date, but the memorandum sent to Jack Grynberg does not rule out possible future assessments.

On November 29, 1989, the Grynbergs commenced an adversary proceeding (the "Adversary Action") in the bankruptcy court, asking for an injunction against the IRS's collection efforts with respect to the pre-petition gift taxes. The Grynbergs asserted the disputed gift tax claims were disallowed when the IRS failed to comply with the bar order either by filing a proof of claim or by objecting to the Reorganization Plan. On January 20, 1990, Defendants filed a Motion to Dismiss or, Alternatively, for Summary Judgment. On March 12, 1990, the Grynbergs responded with a CrossMotion for Summary Judgment. On April 12, 1991, after further collection efforts by the IRS, the Grynbergs filed a Motion for Preliminary Injunction. On May 29, 1991, the bankruptcy court issued an

order denying the Grynbergs' motion for summary judgment, granting Appellees' motion for summary judgment, and dismissing the Grynbergs' complaint. The Grynbergs appeal this order.

II.

STANDARD OF REVIEW

Acting as an appellate court for bankruptcy appeals, district courts are bound to accept the bankruptcy court's findings of fact unless those findings are clearly erroneous. *In re Goin*, 808 F.2d 1391, 1393 (10th Cir. 1987); *In re Golf Course Builders Leasing, Inc.* ___, 768 F.2d 1167, 1169 (10th Cir. 1985); *In re Reid*, 757 F.2d 230, 233 (10th Cir. 1985). Bankruptcy court findings should not be set aside absent "the most cogent reasons appearing in the record." *Reid*, 757 F.2d at 233-34 (quoting *Kansas Federal Credit Union v. Niemeier*, 227 F.2d 287, 291 (10th Cir. 1955)).

The district court reviews questions of law and mixed fact and law questions under a de novo standard. *Golf Course Builders Leasing, Inc.*, 768 F.2d at 1169; *Stafos v. Jarvis*, 477 F.2d 369, 372 (10th Cir. 1973), *cert. denied*, 414 U.S. 944 (1973). The instant appeal primarily raises legal and not factual issues.

III.

NON-DISCHARGEABLE TAX DEBTS

Appellants assert that the IRS's attempt to collect pre-petition gift taxes from the Grynbergs is precluded by the bankruptcy court's Bar Order. We disagree.

A. STATUTORY ARGUMENTS

Section 1141(d) (2) of the Bankruptcy Code provides that "the confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under Section 523 of this title." 11 U.S.C.A. § 1141(d) (2) (West 1979 & Supp. 1991).

Section 523 (a) (1) creates an exception to discharge for any tax debts:

> (A) of the kind and for the periods specified in section 507(a) (2) or 507(a) (7) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return if required –
>
> (i) was not filed . .

11 U.S.C.A. § 523 (West 1979 & Supp. 1991). We conclude that the pre-petition gift taxes at issue in this case fall within the exceptions to discharge set forth in §§ 523(a) (1) (A) and (B) (i) of the Bankruptcy Code.

Section 523 (a) (1) (B) (i) clearly applies to the facts of this case. Courts have construed this section literally, holding that a tax debt is non-dischargeable if the debtor fails to file a tax return. *In re Hofmann*, 76 B.R. 853, 854 (Bankr. S.D. Fla. 1987); *In re Haywood*, 62 B.R. 482, 485 (Bankr. N.D. Ill. 1986). The Grynbergs concede that they never filed a gift tax return. We conclude that § 523 (a) (1) (B) (i) renders the disputed pre-petition gift taxes non-dischargeable.

Section 523(a)(1)(A) also applies in this case. Section 523(a)(1)(A) excepts from discharge tax liabilities of a

kind listed in § 507(a)(7). Section 507(a)(7)(E)(i) includes the following:

> [A]n excise tax on a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition . .

11 U.S.C.A. § 507(a)(7)(E)(i) (West Supp. 1991).

Like all taxes imposed on the performance of an act, a gift tax is an excise type of tax. *See* Black's Law Dictionary, 6th ed., at 563 (West 1990). The gift tax is based upon transactions that took place before the filing of the Grynbergs' petitions. The transfers challenged by the IRS to date occurred in 1980 and 1981, and therefore, these transactions clearly fall within the three year pre-petition window set forth in the statute. Therefore, we find that the pre-petition gift taxes are excepted from discharge under §§ 523(a)(1)(A) and (B)(i).

Appellants' contention that the Bar Order precludes the IRS from seeking to collect the disputed pre-petition gift tax liability is contrary to the relevant statutory provisions. The Grynbergs correctly note that the Bar Order had the effect of disallowing an otherwise allowed claim against the Grynbergs' bankruptcy estates. *See* 11 U.S.C.A. § 502 (West 1979 & Supp. 1991). Appellants cite many cases where bankruptcy courts have refused to allow the IRS or other creditors to amend their proofs of claim after issuance of a Bar Order. *See* e.g., *In re International Horizons. Inc.*, 751 F.2d 1213, 1217-19 (11th Cir. 1985); *In re Nalle*, 125 B.R. 164, 166 (Bankr. W.D. Tex. 1991); *In re Milan Steel Fabricators. Inc.*, 113 B.R. 364,

367-70 (Bankr. N.D. Ohio 1990); *Matter of Dewey Beach Enterprises. Inc.*, 110 B.R. 681, 684 (Bankr. D. Del. 1990); *In re Stavriotis*, 103 B.R. 1005, 1006-07 (Bankr. N.D. Ill. 1989); *In re Byrd*, 94 B.R. 458, 460 (Bankr. S.D. Ohio 1988); *In re Miller*, 90 B.R. 317, 323-24 (Bankr. E.D. Tenn. 1988); *In re Norris Grain Co.*, 81 B.R. 103, 107-08 (Bankr. M.D. Fla. 1987).

Here, the IRS never filed a proof of claim on the pre-petition gift taxes allegedly owed by the Grynbergs. Under the Bar Order and the authorities cited by Appellants, the IRS probably would have been barred from collecting any gift tax debt from the bankruptcy estate. This does not mean, however, that the IRS is barred from collecting non-discharged tax liabilities in post- confirmation, non-bankruptcy proceedings.

Appellants fail to recognize that the disallowance of an otherwise allowed claim by the bankruptcy court does not undermine the statutory exceptions to discharge. Sections 1141(d) (1) (a) (i) and (ii) provide for discharge upon confirmation regardless of whether or not a proof of claim was filed pursuant to 11 U.S.C.A. S 501 (West 1979 & Supp. 1991), or whether or not a claim was allowed or disallowed under § 502. Section 1141(d)(2) provides that "the confirmation of a plan does not discharge an individaul [sic] debtor from any debt excepted from discharge under section 523 of this title."

Taken together, these provisions stand for the proposition that the section 523 exceptions to discharge are not affected by the allowance or disallowance of a claim in bankruptcy. *See In re Gurwitch*, 794 F.2d 584, 585 (11th Cir. 1986); *In re Galbreath*, 83 B.R. 549, 551 (Bankr. S.D. Ill.

1988). A creditor whose claim falls within one of the section 523 exceptions to discharge "may wait until the conclusion of the bankruptcy proceeding and then bring suit on its claim in the appropriate nonbankruptcy forum." *In re Galbreath*, 83 B.R. aat [sic] 551; *accord* Advisory Committee Note, Bankruptcy Rule 4007, Norton, Bankr. L. & Prac. at 267-68 (1987). Therefore, the IRS's efforts to collect non-dischargeable, prepetition gift tax liabilities is not precluded by the doctrine of res judicata. Moreover, neither the Bar order nor the Confirmation Plan purports to raise a res judicata bar to any non-dischargeable debts. Accordingly, we conclude that Appellants' statutory argument fails as a matter of law.

B. INJUNCTIVE RELIEF

Before determining whether equitable relief is warranted, Appellants must show that there is no available remedy at law. *In re Dore & Assocs. Construction Co.*, 45 B.R. 758, 762 (Bankr. E.D. Mich. 1985). Here, Appellants may either file a petition with the United States Tax Court or pay the liability and file a refund claim.

Furthermore, the Tax Anti-Injunction Act precludes injunctive relief against the IRS. 26 U.S.C.A. § 7421(a) (West 1989); *South Carolina v. Regan*, 465 U.S. 367, 378 (1984). For bankruptcy purposes, an exception to the Tax Anti-Injunction Act is premised on 11 U.S.C.A. § 105(a) (West Supp. 1991). In *In re Jon Co.*, 30 B.R. 831, 834 (D.Colo. 1983), Judge Kane enunciated four requisites for obtaining injunctive relief on the basis of bankruptcy proceedings: (1) irreparable harm to the bankruptcy

estate if the injunction does not issue; (2) a strong likelihood of success on the merits; (3) no harm or minimal harm to the other parties or party; (4) a determination of what action better serves the public interest.

The bankruptcy court made factual findings, determining that Appellants failed to satisfy the first and second requisites. The bankruptcy court concluded that the gift tax deficiency assessments did not threaten the Reorganization Plan. Additionally, the bankruptcy court found that Appellants made no showing of any likelihood of success on the merits in their gift tax dispute. Under the clearly erroneous standard, we conclude that the bankruptcy court did not err when it found that Appellants failed to satisfy the bankruptcy-based exception to the Tax Anti-Injunction Act.

C. EQUITABLE ARGUMENTS

Even considering the merits of Appellants' equitable arguments of estoppel and waiver, those arguments fail as a matter of law. The Grynbergs allege that they relied to their detriment upon the IRS's failure to file a proof of claim for the pre-petition gift taxes and the IRS's failure to object to the Reorganization Plan. We disagree.

1. EQUITABLE ESTOPPEL

Equitable estoppel requires proof of the following elements: (1) the party to be estopped must know facts; (2) the party to be estopped must intend that his conduct shall be acted upon or must so act that the party asserting estoppel has the right to believe it is so intended; (3) the

party asserting estoppel must be ignorant of the true facts; and (4) the party seeking estoppel reasonably and detrimentally relied on the conduct of the party to be estopped. *Penny v. Giuffrida,* 897 F.2d 1543, 1545-46 (10th Cir. 1990); *FDIC v. Palermo,* 815 F.2d 1329, 1338 (10th Cir. 1987); *In re Garrison,* 48 B.R. 837, 840-41 (Bankr. D. Colo. 1985).

As a matter of law, Appellants fail to meet the requirements of equitable estoppel. First, the IRS never represented to Appellants that it would not pursue the gift tax claims in post-bankruptcy proceedings. The cases cited by Appellants involve situations where the IRS either gave written notice of its intent not to pursue certain claims, *see Matter of La Difference Restaurant. Inc.,* 63 B.R. 819, 829 (Bankr. S.D.N.Y. 1986), or tried to raise untimely claims within the bankruptcy proceeding. *See e.g., In re International Horizons,* 751 F.2d at 1218-19; *In re Patrick,* 96 B.R. 358, 359 (Bankr. M.D. Fla. 1989).

Second, the central issue on appeal is a dispute over how to interpret the statutory provisions of the Bankruptcy Code. Based on our literal reading of the unambiguous terms of sections 523 and 1141(d) (2) , we find that Appellants' reliance upon the IRS's failure to file a proof of claim for the pre-petition gift taxes was unreasonable and unjustified.

Appellants cite *Matter of Becker's Motor Transp. Inc.,* 632 F.2d 242 (3d Cir. 1980), in support of their position. In *Becker,* the court applied the doctrine of equitable estoppel to prohibit the IRS from seeking to recover certain pre-petition interest in a post-bankruptcy proceeding. *Id.* at 250-51. In that case, the IRS had filed proofs of claim

and collected some pre-petition interest from the debtor during the bankruptcy proceeding. *Id.* Accordingly, the *Becker* Court found that the debtor justifiably believed that the IRS had filed all pre-petition interest claims. *Id.* The bankruptcy court properly concluded that *Becker* stands for the proposition that once a part of a single claim is presented to the bankruptcy court, all other aspects of that claim must be presented, otherwise estoppel may preclude the enforcement of related claims in a later proceeding. The *Becker* Court also held that equitable estoppel did not bar the IRS's post-bankruptcy claims for pre-petition penalties and post-petition interest, because those claims were separate and distinct from the pre-petition interest claims. *Id.* (citing *Bruning v. United States*, 376 U.S. 358 (1964)).

Here, as noted by Appellants, the IRS's proof of claim for income taxes is separate and distinct from the gift tax deficiency at issue. The IRS never raised the gift tax issue in the bankruptcy proceeding. Accordingly, under the clear language of sections 523 and 1141(d) (2) , we find that Appellants had no reasonable basis to conclude that the IRS was barred from pursuing the gift tax deficiencies in post-bankruptcy proceedings.

2. WAIVER

Appellants' waiver arguments are equally unpersuasive. Even if deliberate, the IRS's decision not to file a proof of claim for gift tax deficiencies does not constitute a waiver of post-discharge remedies to collect a non-dischargeable debt under the Bankruptcy Code or case law. 11 U.S.C.A. §§ 523 (a) (1) and 1141(d) (2); *see Newberg*

v. United States, 296 F.2d 152, 153 (2d Cir. 1961); *In re Galbreath*, 83 B.R. 549, 550-51 (Bankr. S.D. Ill. 1988).

Moreover, the IRS's post-confirmation failure to assert a tax deficiency until March 1989 also does not constitute a waiver of its rights to assess a deficiency. Under 26 U.S.C.A. § 6501(c)(3) (West Supp. 1991), the IRS enjoys an unlimited statute of limitations for purposes of making such a deficiency assessment.

D. ABSTENTION

The bankruptcy court has the power to adjudicate the Grynbergs' pre-petition gift tax liability as a core proceeding. 11 U.S.C.A. § 505 (West 1979 & Supp. 1991); 28 U.S.C.A. § 1334(b) (West Supp. 1991). However, the bankruptcy court has the discretion to abstain from hearing core issues in appropriate situations. 28 U.S.C.A. § 1334 (c)(1) (West Supp. 1991). We conclude that the bankruptcy court properly exercised its discretion to abstain.

IV.

ORDER

ACCORDINGLY, it is ordered that the bankruptcy court's Order on Cross-Motions for Summary Judgment, filed May 29, 1991, is AFFIRMED.

Dated this 4 day of November, 1991, at Denver, Colorado.

BY THE COURT:

/s/ _____
Sherman G. Finesilver,
Chief Judge
United States District Court

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: JACK J. GRYNBERG, CELESTE C. GRYNBERG, Debtors,	)	
JACK J. GRYNBERG, CELESTE C. GRYNBERG, Appellants,	)	
v.	)	No. 91-1445
UNITED STATES OF AMERICA, GERALD S. SWANSON, as District Director for the Internal Revenue Service, Appellees.	)	

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 91-F-1025)

Neil E. Ayervais of Lohf, Shaiman & Ross (William D. Scheid of Scheid and Horlbeck, with him on the briefs), Denver, Colorado, for Appellants.

Gary D. Gray, Attorney, Tax Division, (James A. Bruton, Acting Assistant Attorney General; Michael J. Norton, United States Attorney, of counsel; and Murray S. Horwitz, Attorney, Tax Division, with him on the brief), Department of Justice, Washington, D.C., for Appellees.

Before LOGAN, ANDERSON and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge.

Plaintiffs Jack and Celeste Grynberg appeal the district court's affirmance of the bankruptcy court's order granting summary judgment in favor of defendants, the United States government and the Internal Revenue Service (IRS), and dismissing with prejudice plaintiffs' adversary proceeding against defendants.

The facts in this case are undisputed. In early 1981, plaintiffs filed petitions for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§1101-1174.[1] Their cases were jointly administered. As provided under §§521(1) and 1111(a), plaintiffs' bankruptcy schedules listed the United States as a disputed creditor, both for gift

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[1] Unless otherwise noted, all statutory references are to title 11 of the United States Code, the Bankruptcy Code.

taxes and for income taxes. The disputed gift tax liability arose from intra-family transfers of mineral interests made in the year preceding the bankruptcy filings. Plaintiffs never filed gift tax returns on these transfers, contending that they were not taxable gifts.

On June 19, 1981, the bankruptcy court issued the following bar order:

> Creditors holding claims scheduled by Debtor as disputed, contingent, or unliquidated shall file a proof of claim with this Court on or before July 31, 1981 . . . Failure to file a proof of claim shall forever bar a creditor holding a disputed, contingent, or unliquidated claim from participation in this proceeding or in any distribution under a plan filed by the Debtor . .

Appellants' App. at 36. The IRS filed a timely proof of claim for the scheduled income tax liabilities, but not for the gift taxes. In April 1982, the bankruptcy court approved plaintiffs' joint reorganization plan, which made no reference to the disputed gift tax. The IRS did not object to the plan or to its accompanying disclosure statement.

In 1989, after the plan had been fully consummated, the IRS sent Jack Grynberg a notice of a proposed gift tax deficiency and penalties totalling nearly $5 million.[2] In response, plaintiffs filed an adversary action in the bankruptcy court, seeking to enjoin the IRS from collecting the deficiency on the grounds that it had been disallowed under the bar order and discharged at the completion of

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[2] No such notice has been sent to Celeste Grynberg, although this apparently remains a possibility.

the joint reorganization. The bankruptcy court granted defendants' motion for summary judgment and dismissed plaintiffs' complaint. The district court affirmed, and this appeal followed.

"We review the bankruptcy court's decision under the same standard used by the district court." *Citizens Nat'l Bank & Trust Co. v. Serelson (In re Burkart Farm & Livestock)*, 938 F.2d 1114, 1115 (10th Cir. 1991). Thus, we review legal conclusions, such as a grant of summary judgment, de novo and factual findings for clear error. *Unioil v. H.E. Elledge; 270 Corp. (In re Unioil)*, 962 F.2d 988, 990 (10th Cir. 1992).

Section 1141(d)(1)(A) of the Bankruptcy Code provides generally for discharge from any debt that arose before confirmation of the plan, even if no proof of claim was filed or the claim was disallowed. However, § 1141(d) (2) specifically provides that "confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title."

Section 523,[3] when read in conjunction with §1141(d)(2), provides that confirmation of a reorganization plan

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[3] §523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty –

(A) of the kind and for the periods specified in section 507(a) (2) or 507(a) (7) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required –

(i) was not filed . . .

With respect to our analysis here, we need only note that §507(a)(7)(E) refers to excise taxes on transactions occurring

for an individual debtor will not discharge recent excise taxes "whether or not a claim for such tax was filed or allowed," §523(a)(1) (A), or taxes for which returns should have been but were not filed. The gift taxes at issue here fit within both categories.

Section 6019 of the Internal Revenue Code states that any individual making a transfer by gift in excess of $10,000, other than to a spouse "shall make a return for such year with respect to the gift tax imposed." Plaintiffs argue that there is no evidence in the record to support the district court's conclusion that their transfers were taxable gifts that required the filing of a return. The bankruptcy court has never ruled on the merits of the gift tax liability claim, which remains unresolved. However, plaintiffs cannot bootstrap their argument that returns were not required based on the absence of a ruling on the merits of the government's claim for such taxes. We emphasize that nothing in the district court's order purports to fix plaintiffs' gift tax liability; it merely establishes that whatever that liability may be, it has not been discharged.

In any event, these gift taxes fit within the §523(a)(1)(A) exception to discharge that covers taxes entitled to priority under §507(a)(7). Excise taxes include gift taxes, and the transfers at issue occurred within the three year statutory window. Although §507(a)(7) refers

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before the filing of the petition for which returns were due in the three years preceding the filing of the petition, or, if returns were not required, on transactions occurring during the three years immediately preceding the filing of the petition. Gift taxes are excise taxes.

to "allowed unsecured claims of governmental units," §523(a)(1)(A) makes clear that these taxes remain non-dischargeable "whether or not a claim for such tax was filed or allowed." Plaintiffs argue strenuously that the failure of the IRS to file a proof of claim before the bar date imposed by the bankruptcy court subjected their gift tax claim to discharge upon confirmation of the plan, and that the bankruptcy court's determination under the bar order is res judicata. This contention is contrary to the language of the bar order and to the operation of Bankruptcy Rule 3003 under which the bar order was issued.

Bankruptcy Rule 3003(c)(3) requires a bankruptcy court to fix a time for filing proofs of claims. The purpose of this deadline is to "enable a debtor and his creditors to know, reasonably promptly, what parties are making claims against the estate and in what general amounts." *United States v. Kolstad (In re Kolstad)*, 928 F.2d 171, 173 (11th Cir.), *cert. denied*, 112 S. Ct. 419 (1991). However, as the language of the bar order itself states, failure to file a proof of claim before the bar date simply precludes a creditor from participating in the voting or distribution from the debtor's estate.[4] Neither the rules nor the bar

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[4] The bar order essentially follows the contours of the Rule. "[A]ny creditor who fails to [file a proof of claim] shall not be treated as a creditor with respect to such claim *for the purposes of voting and distribution*." Bankruptcy Rule 3003(c) (2) (emphasis added). Usually, the threat of exclusion from distribution under the reorganization plan is sufficient incentive for a creditor to file a proof of claim. Creditors holding nondischargeable debts who do not participate in the distribution of the debtor's estate under the plan take a large risk that the debtor will have nothing left after bankruptcy proceedings are concluded, and that although the debt

order prevents a creditor holding a nondischargeable debt who has not filed a proof of claim from collecting outside of bankruptcy. *See In re Olsen*, 123 B.R. 312, 314 (Bankr. N.D. Ill. 1991) ("the IRS's nondischargeable claim- . . . would survive bankruptcy even if the IRS had never even filed a proof of claim"); *Kinney v. IRS (In re Kinney)*, 123 B.R. 889, 891 (Bankr. D. Nev. 1991) ("[t]he IRS's failure to file timely a proof of claim would, at most, result in a loss of the right to payment under the plan"); *In re Howell*, 84 B.R. 834, 836 (Bankr. M.D. Fla. 1988) ("a creditor holding a nondischargeable debt . . . may execute or collect on the balance of its nondischargeable debt without regard to the discharge provisions of the plan or the Code"); *Galbreath v. Illinois Dep't of Revenue (In re Galbreath)*, 83 B.R. 549, 551 (Bankr. S.D. Ill. 1988) ("a creditor with a type of debt listed as nondischargeable under [§)523(a) (1) . . . may wait until the conclusion of the bankruptcy proceeding and then bring suit on its claim in the appropriate nonbankruptcy forum"). Plaintiffs cite numerous cases emphasizing the finality of bar orders and prohibiting the IRS from filing additional proofs of claim after the bar date has passed.[5] These cases establish only that the IRS is bound to submit its proofs of claim like any other creditor or be foreclosed from participating in the debtor's reorganization. However, like any

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has not been discharged, meaningful recovery will be postponed indefinitely.

[5] *See, e.g., United States v. Ginley (In re Johnson)*, 901 F.2d 513 (6th Cir. 1990); *United States v. Int'l Horizons. Inc. (In re Int'l Horizons)*, 751 F.2d 1213 (11th Cir. 1985); *United States v. Stavriotis*, 129 B.R. 527 (N.D. Ill. 1991); *In re Nalle*, 125 B.R. 164 (Bankr. W.D. Tex. 1991).

other holder of a nondischargeable debt, the IRS is also free to pursue the debtor outside bankruptcy.

Plaintiffs' argument that the bar order disallowed the gift tax claim is unconvincing.[6] It is undisputed that defendant's failure to file a proof of claim for the gift taxes precluded it from participating in the voting and distribution under plaintiffs' Chapter 11 plan. It is equally clear, however, that a bankruptcy court's determination of a claim's untimeliness does not affect application of the §523 exceptions to discharge. We agree with *Spruill v. South Atl. Prod. Credit Assoc. (In re Spruill)*, 83 B.R. 359 (Bankr. E.D.N.C. 1988), which considered this issue and concluded that §523(a) (1) (A) "was intended to prevent the discharge of tax claims which were never filed or filed late but which would otherwise have been allowable." *Id.* at 361. It held that while disallowance on the merits would have prevented the IRS from pursuing the gift tax claim postbankruptcy, disallowance for untimeliness does not act as a bar to asserting nondischargeability in subsequent litigation. *Id. See also Olsen*, 123 B.R. at 314 ("(t)he Bankruptcy Code makes it clear that the actual allowance of a tax claim as a priority debt and the nondischargeability of a tax claim are not related"); *Great Am. Ins. Co. v. Graziano (In re Graziano)*, 35 B.R. 589, 592 (Bankr. E.D.N.Y. 1983) ("creditor's failure to file a proof of claim does not act as a bar to an action to determine dischargeability"); *Massoni v. District Director*

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[6] Plaintiffs rely on a portion of the bar order providing that "all claims listed as disputed in the Grynbergs' schedules would be disallowed if a timely proof of claim was not filed with respect to such claims."

of IRS (In re Massoni), 20 B.R. 416, 419 (Bankr. D. Kan. 1982) ("the failure of the IRS to file a proof of claim does not affect the debt's dischargeability"). The clear provisions of Bankruptcy Rule 3003(c) (2) limit the rights of a creditor failing to file a proof of claim only with respect to voting and distribution under the plan. Bar orders issued pursuant to this rule have no other effect.[7]

Although allowing the IRS to pursue its claim after the confirmation and consummation of a Chapter 11 plan admittedly conflicts with the "fresh start" policy animating the Code's discharge provisions, "it is apparent to us that Congress has made the choice between collection of revenue and rehabilitation of the debtor by making it extremely difficult for a debtor to avoid payment of taxes under the Bankruptcy Code." *United States v. Gurwitch (In re Gurwitch)*, 794 F.2d 584, 585-86 (11th Cir. 1986). This is an express congressional policy judgment that we are bound to follow. See *United States v. Sotelo*, 436 U.S. 268, 279-80 (1978).

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[7] Plaintiffs suggest that under *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), the failure of a governmental unit to submit a proof of claim renders that claim dis-chargeable even if it falls within the § 523 exceptions to discharge. We disagree. *Hoffman* addresses a jurisdictional question holding that § 106(c) "permit(s) a bankruptcy court to determine the amount and dischargeability of an estate's liability" to a state government. *See United States v. Nordic Village Inc.*, 112 S. Ct. 1011, 1016 (1992) (citation omitted). However, the fact that a governmental unit is subject to bankruptcy court jurisdiction on the question of dischargeability even if it never filed a, proof of claim does not mean that a governmental unit's failure to file a proof of claim on a nondischargeable debt necessarily results in discharge.

Finally, plaintiffs maintain that to be excepted from discharge under §523, the disputed gift tax must be a "debt." The Code defines debt as "liability on a claim." §101(12). Because the IRS never filed a proof of claim for the gift tax, the argument goes, it does not have a debt, and without a debt there is nothing to be deemed nondischargeable. Although this syllogism is semantically creative, it disregards the broader purposes and logic of the Code. Plaintiffs neglected to include in their argument the definition of "claim," which means a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." §101(5) (A). The Supreme Court has held that the language of §101(5) (A) "reflects Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt.' " *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1990). Nothing in the definition of the term requires the submission of proof to establish a claim's existence. Proof is required only to ensure the creditor's participation in the reorganization. In view of this expansive definition of the term "claim," we have no difficulty characterizing the gift taxes as a disputed right to payment, thus qualifying as a "debt" that can be excepted from discharge under § 523.

Plaintiffs' difficulties might easily have been averted. The Bankruptcy Code includes a mechanism specifically to protect debtors in those situations in which the creditor's debt is nondischargeable. Section 501(c) provides that "[i]f a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof

of such claim." Bankruptcy Rule 3004 gives the debtor or trustee thirty days after the bar date to file such claims. Together, §501(c) and Rule 3004 afford the debtor the broadest relief possible in bankruptcy by allowing the debtor to bring in all known claimants and, through payment under the plan, to reduce the amount of non-dischargeable debt owed after the closing of the case. Had plaintiffs taken advantage of this provision, §1129(a)(9)(C) would have permitted confirmation of a plan that included deferred cash payments for excise taxes on transfers made within the three year window specified in §507(a)(7)(E). *See generally Kolstad*, 928 F.2d at 174. Because the IRS declined to file the claim and hence did participate in plaintiffs' reorganization with respect to this claim, and because plaintiffs failed to use the statutory mechanism for mandatory' participation available to them, the IRS is now free to recover outside bankruptcy. *In re Kloeble*, 112 S.R. 379, 381 (Bankr. S.D. Cal. 1990) ("[t]he apparent consequence of the debtor's failure to file for the creditor within the time allotted under Rule 3004 is that the debtor remains burdened with the debt post-discharge to the extent the debt was non-dischargeable").

AFFIRMED.

APPENDIX D

11 U.S.C. LAW

SECTION 101 (11 U.S.C. §101)

§101. Definitions. In this title –

(5) "claim" means –

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

(10) "creditor" means –

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(12) "debt" means liability on a claim;

SECTION 106 (11 U.S.C. § 106)

§106. Waiver of sovereign immunity.

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and

that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity –

(1) a provision of this title that contains "creditor," "entity" or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

SECTION 501 (11 U.S.C. §501)

§501. Filing of proofs of claims or interests.

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

(d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.

SECTION 502. (11 U.S.C. §502)

§502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that –

> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(7) of this title shall be determined, and

shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

SECTION 505 (11 U.S.C. §505)

§505. Determination of tax liability.

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed,

whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

SECTION 507 (11 U.S.C. §507)

§507. Priorities.

The following expenses and claims have priority in the following order:

(7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for –

(E) an excise tax on –

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

SECTION 521 (11 U.S.C. §521)

§521. Debtor's duties. The debtor shall –

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a

schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

SECTION 523 (11 U.S.C. §523)

§523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty –

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit –

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

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SECTION 1111 (11 U.S.C. §1111)

§1111. Claims and interests.

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or

1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

SECTION 1126 (11 U.S.C. §1126)

§1126. Acceptance of plan.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

SECTION 1129 (11 U.S.C. §1129)

§1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

> (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that –
>
> (C) with respect to a claim of a kind specified in section 507(a)(7) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date

of the plan, equal to the allowed amount of such claim.

SECTION 1141 (11 US.C. §1141)

§1141. Effect of confirmation.

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(d)(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

SECTION 1144 (11 U.S.C. §1144)

§1144. Revocation of an order of confirmation. On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall –

(1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and

(2) revoke the discharge of the debtor.

Rule 3003.

FILING PROOF OF CLAIM OR EQUITY SECURITY INTEREST IN CHAPTER 9 MUNICIPALITY OR CHAPTER 11 REORGANIZATION CASES

(a) Applicability of Rule. This rule applies in chapter 9 and 11 cases.

(b) Schedule of Liabilities and List of Equity Security Holders

(1) Schedule of Liabilities. The schedule of liabilities filed pursuant to §521(1) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule.

(c) Filing Proof of Claim.

(1) Who May File. Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

(2) Who Must File. Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; and creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) Time for Filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

(4) Effect of Filing Claim. A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521(1) of the Code.

Rule 3004.

FILING OF CLAIMS BY DEBTOR OR TRUSTEE

If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to §341(a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. A proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee.

Rule 9024.

RELIEF FROM JUDGMENT OR ORDER

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by §727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by §1144 or §1330.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO

In re	)	Case
	)	Number
JACK J. GRYNBERG	)	81 B 00821 M
a/k/a Jack Jakob Grynberg	)	
a/k/a Jack Grynberg	)	
d/b/a Jack Grynberg and Associates	)	SECOND
d/b/a Jack Grynberg & Associates	)	MODIFIED
	)	JOINT
Debtor,	)	PLAN OF
	)	REORGANIZATION
and	)	
	)	
CELESTE C. GRYNBERG	)	Case
a/k/a Celeste Constance Grynberg,	)	Number
	)	81 B 00825 M
a/k/a Celeste Grynberg,	)	
	)	
Debtor.	)	

Jack J. Grynberg and Celeste C. Grynberg, the above-named debtors, propose the following Second Modified Joint Plan of Reorganization, which supersedes the Joint Plan of Reorganization filed herein on August 31, 1981, as previously modified on October 14, 1981.

DEFINITIONS

1. *"Debtors"* means Jack J. Grynberg and Celeste C. Grynberg; references to them individually may be by their respective names.

2. *"Court"* means the United States Bankruptcy Court for the District of Colorado, including the United States Bankruptcy Judge presiding in the Proceedings.

3. *"Proceedings"* means the above-captioned proceedings commenced by the respective Debtors under Chapter 11 of the Bankruptcy Code; references to either of the Proceedings may be by their respective case numbers.

4. *"Claim"* means a duly scheduled or timely filed claim against the Debtors or either of them which is allowed and ordered paid by the Court.

5. *"Debt"* means liability upon a Claim which shall include interest to the full extent payable under contract, applicable state law or as the Court may determine to be equitable under the Bankruptcy Code.

6. *"Creditors"* means all creditors of the Debtors or of Jack J. Grynberg or Celeste C. Grynberg holding Claims against the Debtors or either of them for unsecured debts, liabilities, demands or claims of any character whatsoever.

7. *"Secured Creditors"* means all Creditors who hold a lien, security interest, or other encumbrance which has been properly perfected as required by law in resepct to property of the Debtors or either of them or property otherwise subject to this Plan.

8. *"Disputed Creditors"* and *"Disputed Claims"* refer to Creditors or Claims, as the case may be, in respect to which the pertinent Debt (a) has not been allowed or ordered paid by the Court, (b) was scheduled in the Proceedings by the Debtors or either of them as disputed,

contingent or unliquidated and (c) is the subject of a proof of claim duly filed in the Proceedings against the Debtors or either of them on or before July 31, 1981 or, if not so scheduled, is the subject of a proof of claim filed in the Proceedings which the Debtors or either of them dispute.

11. *"Other Disputed Creditors"* means all Disputed Creditors other than Danzig Creditors and Judgment Creditors, including all Disputed Creditors holding Claims previously reduced to a judgment or order of allowance which has been set aside, reversed or otherwise vacated for any reason.

ARTICLE I

CLASSIFICATION OF CLAIMS

1.1 *Class I* – Costs and expenses of administration as defined in the Bankruptcy Code for which a Claim, application for ~~or for~~ allowance is filed prior to the Effective Date, as the same are allowed, approved and ordered paid by the Court.

1.2 *Class II* – All other claims entitled to priority under the Bankruptcy Code, as the same are allowed, approved and ordered paid by the Court.

1.3 *Class III* – Secured Creditors of the Debtors or either of them as their Claims existed on February 20, 1981, the date of filing of the original Petition herein, as finally allowed and ordered paid by the Court and to the extent that such Claims are not greater than the value of assets of the Debtor or either of them which the Court finds are valid security for such Claims.

1.4 *Class IV* – Claims of all Creditors of the Debtors or either of them, excluding those in Classes I, II, III and V, as the same are allowed and ordered paid by the Court, including (but not limited to) creditors whose Claims may arise out of the rejection of executory contracts and Creditors claiming security to the extent that the Court finds that the same are unsecured, in whole or in part.

1.5 *Class V* – Creditors who include the Grynberg Entities or Creditors whose claims are founded, directly or indirectly, upon claims of the Grynberg Entities, to the extent that such claims are allowed and ordered paid by the Court subject to subordination provisions set forth in the Plan.

ARTICLE II

CLAIMS NOT IMPAIRED UNDER THE PLAN

2.1 Class I and Class II Creditors shall be paid in cash and in full, as and when their claims are allowed and ordered paid by the Court. Class IV Creditors who have been scheduled by the Debtors or either of them as undisputed or who have duly filed Claims which are not disputed by the Debtors or either of them shall be paid in cash and in full, as and when their Claims are allowed and ordered paid by the Court. Class III Creditors who are not Disputed Creditors are and not included in Class V shall retain unaltered their legal, equitable and contractual rights as they existed on February 20, 1981, the date of filing of the original petitions herein, to the extent, if

any, that their Claims have not been otherwise discharged since February 20, 1981.

2.2 The proper interests (if any) of all Class II, Class III and Class IV Creditors who are Disputed Creditors will be paid in cash and in full as and when their Claims are finally allowed and ordered paid by the Court.

2.3 All claims described in this Article II are not impaired under the Plan by virtue of the following:

(a) To the extent that any such Claims have been allowed and ordered paid by the Court on the Effective Date, such Claims will be paid in full on or as soon as practicable after the Effective Date.

(b) To the extent that any such Claims have not been allowed and ordered paid on the Effective Date by reason of unresolved disputes or otherwise, the proper interests (if any) of holders of such Claims, including their possible right to priority of payment over other claimants, are preserved and protected by the security interests in and liens upon the Dedicated Property and other protections afforded by Article IV of this Plan, including its restrictions upon disbursements of funds and requirements for Substitute Protection.

4.17 The nature and validity of all Disputed Claims shall be determined as of the filing of the Debtors' original Chapter 11 Petitions her in on February 20, 1981, except to the extent, if any, that Disputed Claims are based on or arise out of circumstances since February 20, 1981. Nothing contained in this Article IV or elsewhere in the Plan shall be deemed to augment, diminish or otherwise modify the entitlement to interest under applicable

law or the security or priority, if any, of any Disputed Creditor except as expressly set forth in the Plan or to waive any defense or objection of the Debtors or either of them to any Disputed Claim. To the extent that (a) any Disputed Claim or (b) Substitute Protection previously afforded in respect thereto is or becomes insufficient to protect all proper interests of such holder, and the insufficiency is not duly cured in accordance with the Plan, the Debtors and each of them shall remain liable to such holder subsequent to the Effective Date and shall not be discharged from liability upon such Claim except by payment, settlement or final resolution of the Disputed Claim in favor of the Debtors.

ARTICLE VIII

JURISDICTION OF THE COURT

8.1 Upon the Effective Date or at such earlier time as the Court may order after confirmation of the Plan, (a) the Debtors shall be revested with their assets and entitled to manage their affairs without further Order of the Court and (b) all Creditors and the Debtors will be bound by the provisions of this Plan to the exclusion of all other rights which may be or become available.